

EDWIN D. SCHINDLER

PATENT, TRADEMARK & COPYRIGHT ATTORNEY

Five Hirsch Avenue
P. O. Box 966
Coram, New York 11727

Telephone: (631)474-5373
Fax: (631)474-5374
E-Mail: EDSchindler@worldnet.att.net
EDSchindler@optonline.net

January 16, 2008

Hon. Alvin K. Hellerstein
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

VIA ECF

Re: *Brooklyn Bottling of Milton, New York, Inc.*
v. Ecuabeverage Corp.
Civil Action No. 07-Civ.-8483 (AKH)

Dear Judge Hellerstein:

Defendant Ecuabeverage Corp. ("Ecuabeverage") respectfully submits this letter, in advance of the status conference to be held the morning of Friday, January 18, 2008, during which it is anticipated that the parties' *Civil Case Management Plan* will be discussed, to explain Ecuabeverage's objection to permitting Plaintiff, Brooklyn Bottling of Milton, New York, Inc. ("Brooklyn Bottling"), the option of amending its *Complaint* without first seeking leave of the Court.

Counsel for the parties conducted a telephonic conference on January 8, 2008, for the purpose of reaching agreement on the case management plan for this trademark infringement litigation. During the conference, undersigned counsel for Ecuabeverage explained that he could not agree to allow Brooklyn Bottling to amend its *Complaint*, to the extent that any proposed amendment by Brooklyn Bottling would impact the merits of Ecuabeverage's pending *Motion to Dismiss* Counts I and II of the *Complaint* due to Brooklyn Bottling's lack of standing to assert these Counts. It is fundamental that a party lacking standing to bring a claim, likewise lacks standing to amend its *Complaint*, at least as to those claims for which the party's standing is absent. *See, Manson v. Stacescu*, 11 F.3d 1127, 1133 (2d Cir. 1993) (rejecting as futile proposed amendment of claims plaintiffs lacked standing to assert).

The parties' proposed *Civil Case Management Plan* indicates that the parties disagree with respect to any amendment of Brooklyn Bottling's pleadings for the purpose of adding a party. This is not an entirely accurate statement: Ecuabeverage objects to any

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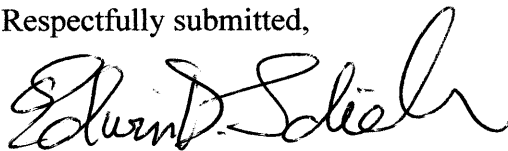
amendment by Brooklyn Bottling of Counts I and II of its *Complaint* due to its lack of standing. Whether another party might be added to this action is not known and, at present, not before this Court. Ecuabeverage takes no position, at this time, concerning either the right or correctness of another party joining this action, except to state that no party should be permitted to enter this action as a matter of right. Ecuabeverage, therefore, fully reserves its right to object to the inclusion of an additional party, should a proper motion be made by the proper party.

Ecuabeverage would not object to an amendment by Brooklyn Bottling of its *Complaint* with respect to Counts III and IV, by March 8, 2008, for which Brooklyn Bottling appears to possess standing. In this respect, however, Ecuabeverage submits that Brooklyn Bottling's use of its purported trademark would appear to commence no earlier than June 1, 2007, and, even if there was a likelihood of confusion between the respective marks of the parties – and Ecuabeverage states that it is not even using the trademark that Brooklyn Bottling alleges Ecuabeverage to be using – Ecuabeverage would readily be able to establish “priority of use” and prevail, as a matter of law, on Counts III and IV of the *Complaint*.

In summation, Ecuabeverage would not object to a timely amendment by Brooklyn Bottling of Counts III and IV of its *Complaint*, though Ecuabeverage sees little to be gained were Brooklyn Bottling to amend these Counts. Ecuabeverage, however, wishes to reserve its right to challenge any proposed amendment of Brooklyn Bottling's *Complaint* with respect to Counts I and II, including any attempt by Brooklyn Bottling (or a third party) to add a party to this action.

Thank you for your consideration of this letter.

Respectfully submitted,



Edwin D. Schindler (ES-7882)
Attorney for Defendant
Ecuabeverage Corp.

*cc: Jeffrey E. Jacobson – Attorney for Plaintiff via ECF & Fax: (212)645-5038 on
January 16, 2008*